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Privacy in the First Amendment: Private Facts and the Zone of Deliberation

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I. INTRODUCTION

It is no surprise that the press, in exercising its traditional first amendment freedom, often discloses truthful information about individuals that those individuals would prefer to keep private. An inevitable tension exists between the public's right to know and the individual's right to be let alone.[1] What is surprising, however, espe-

1. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890). Louis Brandeis and Samuel Warren first coined the phrase "right of the individual to be let alone" and designated it as central to the meaning of the right to privacy. They wrote, "the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far

cially given the historic recognition of both a free press and individual privacy as rights fundamental to the preservation of American society,[2] is that the privacy interests of the individual almost always lose.[3]

The prevalent rationale for this lopsided result is that the first amendment protects the values promoted by press freedom and that any infringement of these values consequently warrants the strictest scrutiny by the courts.[4] The values promoted by privacy, on the other hand, are general liberty interests within the fifth and fourteenth amendments that, when threatened, deserve only due process balancing.[5] Some legal scholars, therefore, have claimed that the public disclosure tort,[6] which gives individuals a cause of action against a publisher of embarrassing private facts of no legitimate public interest, is facially invalid.[7] Nevertheless, recent Supreme Court decisions reflect, and most

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as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone." *Id.* at 205. *But see* Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326 (1966). For the best general treatment of privacy, see A. WESTIN, PRIVACY AND FREEDOM (1967). The most provocative current studies of privacy are: S. BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION (1983); K. SHEPPELE, LEGAL SECRETS (1988); Bloustein, *Privacy As an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964); Epstein, *Privacy, Property Rights, and Misrepresentations*, 12 GA. L. REV. 455 (1978); Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421 (1980); Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989).

2. *See* Florida Star v. B.J.F., 109 S. Ct. 2603, 2609 (1989) (stating that "press freedom and privacy rights are both 'plainly rooted in the traditions and significant concerns of our society' ") (quoting Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975)).

3. As Justice Byron White proclaimed in his *Florida Star* dissent, "the trend in 'modern' jurisprudence has been to eclipse an individual's right to maintain private any truthful information that the press wished to publish." *Id.* at 2619 (White, J., dissenting).

4. *See, e.g., id.* at 2609-10; New York Times v. Sullivan, 376 U.S. 254, 270 (1964); *see also infra* note 29.

5. For the clearest extended analysis of this separation of rights in the jurisprudential philosophy of Alexander Meiklejohn, see Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41, 42-61 (1974). For Meiklejohn's own analysis of privacy and the freedoms of press and speech, see *infra* notes 21-29 and accompanying text; and for evidence of the influence of Meiklejohn's view on the Supreme Court, see *infra* notes 18-20 and accompanying text.

6. *See* Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960). Prosser wrote: The public disclosure tort generally requires that "something secret, secluded or private pertaining to the plaintiff" be invaded and that the something be publicized; but, it does not require the publication to be false, or to be for the commercial advantage of the defendant. *Id.* at 407. The *Restatement (Second) of Torts* codified this public disclosure of embarrassing private facts about the plaintiff. *See* RESTATEMENT (SECOND) OF TORTS § 652D (1977) (applying the tort to the giving of "publicity to a matter concerning the private life of another" that is "highly offensive to a reasonable person and is not of legitimate concern to the public").

7. *See* Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting of Fact*, 16 STAN. L. REV. 107 (1964). Other commentators who have noticed the potential unconstitutionality of a public disclosure tort include T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 517 (1970) and Kalven, *supra* note 1, at 336. *See also* Kapellas v. Kofman, 1 Cal. 3d 20, 35, 459 P.2d 912, 922, 81 Cal. Rptr. 360, 370 (1969); Hall v. Post, 323 N.C. 259, 372 S.E.2d 711, 715 (1988).

scholars recognize, a constitutionally based privacy right, but suggest that the first amendment may give publishers of private truthful information a complete defense of privilege.[8]

The analytical premises of the Court's first amendment model, however, do not necessitate that the Court always subordinate individual privacy to press freedom. Instead, these premises actually support a first amendment interest in protecting the privacy of the individual, thereby preserving the public disclosure tort remedy.[9] Thus, cases concerning the public disclosure of private facts pose a difficult constitutional dilemma: courts must choose between two opposing claims, both of which arise not from conflicting constitutional provisions, but from the first amendment. As a result, the Court should balance these competing claims with equal scrutiny and on a level playing field.

This Note re-evaluates the Court's own model of the first amendment and shows that under its model, the Court errs when it summarily dismisses an individual's privacy interest in favor of a publisher's claim of first amendment privilege. If both claims arise from the same constitutional provision and both merit strict scrutiny, then the Court must accommodate both claims without denying either one its unique protection under the first amendment. Part II of this Note examines and criticizes the classic democratic model of the first amendment. Part III recommends amending the model to accommodate protection of indi-

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8. The Court constantly has claimed that the majority currently does not accept this complete defense for publishers. Justice Thurgood Marshall has stated: "Nor need we accept appellant's invitation to hold broadly that truthful publication may never be punished consistent with the First Amendment. Our cases have carefully eschewed reaching this ultimate question. . . ." *Florida Star*, 109 S. Ct. at 2608. The line of cases from *New York Times*, 376 U.S. at 254, to *Florida Star*, however, may make one question the sincerity of the above statement; for example, as Justice White states, "If the First Amendment prohibits wholly private persons . . . from recovering for the publication of the fact that she was raped, I doubt that there remain any 'private facts' which persons may assume will not he published in the newspapers, or broadcast on television." *Florida Star*, 109 S. Ct. at 2618 (White, J., dissenting); *see also infra* subpart II(A) and Part IV.

9. *See infra* notes 47-50 and 54-63 and accompanying text. For a comprehensive introduction to model theory, see C. HEMPEL, ASPECTS OF SCIENTIFIC EXPLANATION 155-71 (1965). According to Carl Hempel, models are intellectual constructs, formed by a synthesis of familiar arguments and views, that "cannot be found in reality" but with which "concrete phenomena can he compared for the purpose of explicating some of their significant components." *Id.* at 156. The notion that legal principles or legal constructs possess an internal logic all their own, exhibiting what Hempel refers to as a "modeling" of reality, is not a novel idea in legal scholarship. *See* L. JAFFE, ENGLISH AND AMERICAN JUDGES AS LAWMAKERS 38 (1969) (noting that the "judge must believe in the validity of the reasons given for the decision at least in the sense that he is prepared to apply them to a later case which he cannot honestly distinguish"); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959) (stating that a "principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved"). For an excellent current example of the use of model theory in legal analysis, see Fallon, *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988).

vidual privacy. Part IV then analyzes a particular application of the amended model to the Supreme Court's recent excursion into this area in *Florida Star v. B.J.F.*[10] Finally, Part V briefly assesses the state action concerns relating to the amended model proffered in this Note.

II. THE CLASSIC DEMOCRATIC MODEL OF THE FIRST AMENDMENT: MEIKLEJOHN REVISITED

A. *Meiklejohn,* New York Times v. Sullivan, *and the Democratic Model*

Justice Louis Brandeis, in his legendary concurrence in *Whitney v. California,*[11] eloquently argued that democratic society must value free speech "both as an end and as a means."[12] Free speech is an intrinsically valuable goal because it is a manifestation of the ultimate purpose of government: to free its citizens so that they may pursue self-fulfillment.[13] As a means, free speech is an indispensable check on political integrity and truth.[14] Generally speaking, since Justice Brandeis set forth the competing models, two schools of thought have emerged in the literature—one that views the freedom of speech as noninstrumentalist and self-oriented[15] and another that views it as instrumental

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10. 109 S. Ct. 2603 (1989).

11. 274 U.S. 357 (1927). For an insightful treatment of Brandeis's first amendment jurisprudence and a fair, but sustained, attack on Bork's analysis and modifications of Brandeis's theories, see Garfield, *Twentieth Century Jeffersonian: Brandeis, Freedom of Speech and the Republican Revival* (in manuscript) (1990). *But cf.* Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L.J. 1, 20 (1971) [hereinafter Bork, *Neutral Principles*] (arguing that "there should be no constitutional obstruction to laws making criminal any speech that advocates forcible overthrow of the government or the violation of any law"). *See generally* R. BORK, THE TEMPTING OF AMERICA 333-36 (1990) [hereinafter R. BORK, TEMPTING AMERICA] (same).

12. Justice Brandeis wrote:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Whitney, 274 U.S. at 375-76 (Brandeis, J., concurring) (citations omitted).

13. *Id.* (Brandeis, J., concurring).

14. *Id.* (Brandeis, J., concurring).

15. *See, e.g.,* S. BENN, A THEORY OF FREEDOM (1988); T. EMERSON, *supra* note 7, at 6 (stating that "freedom of expression is essential as a means of assuring individual self-fulfillment"); J. RAZ, THE MORALITY OF FREEDOM (1986); M. REDISH, FREEDOM OF EXPRESSION (1984); Baker, *Realizing*

to democratic government.[16]

The Supreme Court adopted the instrumentalist model, which values free speech because it is essential to democratic government, in *New York Times v. Sullivan*.[17] In its opinion the Court emphasized a national commitment to unrestrained public debate.[18] By adopting the instrumentalist model, the Court recognized that a general interest on the part of the citizenry to be informed political participants is implicit in the public's commitment to free speech. The Court's model rests on the premise that free speech provides citizens with access to the ingredients critical to successful self-governance.[19]

As Justice William Brennan acknowledged, the Court developed its self-governance model for protecting first amendment freedoms in light of the work of Alexander Meiklejohn.[20] Meiklejohn characterized first amendment protections as fundamentally public in nature.[21] Freedom

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Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech, 130 U. PA. L. REV. 646 (1982); Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978); Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) [hereinafter Redish, *Value of Free Speech*]; Redish, *Self-Realization, Democracy and Freedom of Expression: A Reply to Professor Baker*, 130 U. PA. L. REV. 678 (1982); Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519 (1979); *see also infra* notes 45-49 and accompanying text. The major criticism of this theory is that its scope protects too much expression because any expression can render one more autonomous. Distinguishing freedom of speech from other liberties that are important to individual autonomy, such as the right to a job or an education, is also difficult. If the goal is self-autonomy, then all forms of expression and all liberties that render one more autonomous demand a heightened protection, a heightened protection traditionally reserved for only political speech. *See infra* note 50; *see also* F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY 56 (1982); Bork, *Neutral Principles*, *supra* note 11, at 25.

16. *See, e.g.*, R. BORK, TEMPTING AMERICA, *supra* note 11; A. MEIKLEJOHN, POLITICAL FREEDOM (1960); BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978); Bork, *Neutral Principles*, *supra* note 11; Fiss, *Why the State*, 100 HARV. L. REV. 781 (1987); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191; Meiklejohn, *Public Speech and the First Amendment*, 55 GEO. L.J. 234 (1966); Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245. The major critiques of this influential model are presented in subpart II(B) of this Note.

17. 376 U.S. 254 (1964).

18. Justice Brennan, writing for the majority, emphasized that the Court "consider[ed] this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270.

19. *See* Red Lion Broadcasting v. F.C.C., 395 U.S. 367, 390 (1969) (stating that free speech gives citizens "access to social, political, esthetic, moral, and other ideas and experiences . . ."); *see also* Rosenbloom v. Metromedia, 403 U.S. 29, 41 (1971).

20. *See* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); *see also* Kalven, *supra* note 16.

21. In Meiklejohn's classic formulation, "The First Amendment does not protect a 'freedom to speak.' It protects the freedom of those activities of thought and communication by which we 'govern.' It is concerned, not with a private right, but with a public power, a governmental responsibility." Meiklejohn, *supra* note 16, at 255. Meiklejohn continued:

[T]he title "Bill of Rights" is lamentably inaccurate as a designation of the first ten amend-

of speech under this view is not a private right, but a public power.

According to Meiklejohn, the citizenry in a democratic system occupy a dual role as the "majority" and as "individuals."[22] The majority does not delegate its powers of government to its elected agents, but retains sovereignty while enlisting the aid of its agents as servants charged with carrying out the majority's will. To function properly in its capacity as sovereign, the majority must have access to the information necessary to direct its agents appropriately.[23] The characterization of the majority as sovereign and the government as servant compels a recognition of the right of the people to criticize their leaders and to forbid censorship by the government of information necessary to self-governance.[24]

On the other hand, the people as private individuals do not have governing powers but only private rights that limit the exercise of governmental powers by their elected agents. While the majority's power of self-governance is absolute and any government interference should receive the strictest of scrutiny, the individual's rights as a private citizen are unrelated to majority self-governance. Therefore, these private rights should be protected only to the extent that they outweigh the government's need to interfere.[25]

In other words, Meiklejohn's analysis bifurcates the interests of the citizens into those interests necessary to the people's power as governors, which deserve absolute protection, and those interests of each citizen as an individual, which the government may regulate limited only by the requirement of due process.[26] The subsequent inference seems clear and is made cursorily in the literature:[27] specifically, freedom of the press belongs to the former category of interests while the individual's right to privacy, the right to control or conceal information about

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ments. They are not a "Bill of Rights" but a "Bill of Powers and Rights." The Second through the Ninth Amendments limit the powers of the subordinate agencies [Congress and the States] in order that due regard shall be paid to the *private* "rights of the governed." The First and Tenth Amendments protect the governing "powers" of the people from abridgement by the agencies which are established as their servants. In the field of our "rights," each one of us can claim "due process of law" [under the Fifth Amendment]. In the field of our governing "powers," the notion of "due process" is irrelevant.

Id. at 254 (emphasis added).

22. *See* A. MEIKLEJOHN, *supra* note 16, at 37-38, 115.

23. As Professor Frederick Schauer has pointed out, this proper functioning entails "the necessity of making all relevant information available to the sovereign electorate so that they . . . can decide which proposals to accept and which proposals to reject." F. SCHAUER, *supra* note 15, at 38.

24. *Id.* at 38-39.

25. *See* A. MEIKLEJOHN, *supra* note 16, at 37-38, 115; *see also* Bloustein, *supra* note 5, at 42-51.

26. A. MEIKLEJOHN, *supra* note 16, at 37-38.

27. *See supra* notes 20-22.

oneself, belongs to the latter category of interests. This model seems to explain nicely the superlatives that the Court attaches to press freedom[28] and the lopsided results in favor of press freedom over competing individual interests.[29]

B. Critiques of the Democratic Model

1. Majority Determination of Free Speech Protections

Any instrument is only as effective as the person or persons who wield it. The same holds true for the instrumental model of free speech protections articulated by the Court in *New York Times v. Sullivan*.[30] Under the rubric of Meiklejohn's classic democratic model, the majority wields the instrument of free speech. This model uncritically assumes that to preserve its freedom of speech, the majority need protect itself only from its agents, the federal and state governments.[31] Because the value of free speech lies in its function as an instrument for ascertaining and implementing the majority's will, it follows that when the sovereign decides through the democratic process to limit the protections of free speech, this model provides no logical check to stop it.[32]

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28. *See, e.g.*, Florida Star v. B.J.F., 109 S. Ct. 2603, 2609-10 (1989).

29. The line of Supreme Court cases dealing with these competing interests is rather meager. Justice Marshall describes this area of the law as "somewhat uncharted" and in marked contrast to "the well-mapped area of defamatory falsehoods." *Id.* at 2607 n.5. Nevertheless, in support of the Court's holding in *Florida Star*, Justice Marshall cited Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977), and Smith v. Daily Mail Publisbing Co., 443 U.S. 97 (1979), all of which accord the press ample first amendment protection at the expense of the individual privacy interests at stake. *Florida Star*, 109 S. Ct. at 2607.

30. 376 U.S. 254 (1964).

31. *See* Partlett, *From Red Lion Square to Skokie to Fatal Shore: Racial Defamation and Freedom of Speech*, 22 VAND. J. TRANSNAT'L L. 431 (1989); Welch, *The State As a Purveyor of Morality*, 56 GEO. WASH. L. REV. 540 (1988).

32. *See* F. SCHAUER, *supra* note 15, at 40. Professor Schauer has noted:

> If the people collectively are in fact the sovereign, and if that sovereign has the unlimited powers normally associated with sovereignty, then acceptance of this view of democracy compels acceptance of the power of the sovereign to restrict the liberty of speech just as that sovereign may restrict any other liberty. Moreover, there is no reason to say that the sovereign may not entrust certain individuals with certain powers [such as powers to limit freedom of speech]. The power to delegate authority is implicit in the unlimited power that sovereignty connotes.

Id.; *see also* L. BOLLINGER, THE TOLERANT SOCIETY 50-58 (1986).

Arguably, the amendment process itself estahlishes the majoritarian underpinnings of the Constitution and, thereby, the first amendment. For example, the first amendment could be amended to protect all speech except speech advocating the violent overthrow of the United States. *See* Bork, *Neutral Principles*, *supra* note 11, at 20. Thus, any adequate model of the first amendment must admit its democratic foundation. The additional requirement of an amendment to the Constitution, a "super majority," however, cannot be based *solely* on majoritarian values, and any adequate model of the first amendment must also admit, in this sense, its republican, countermajoritarian foundation.

The democratic model of Meiklejohn naively assumes that the majority as sovereign is rational and tolerant and poses no threat to the well-being of the individual citizen. This assumption ignores the difficulty posed by the situation in which, after dialogue and open debate, the majority determines that certain speech is intolerable and charges its agents with implementing the sovereign's will by eradicating the undesirable speech. The classic democratic model would seem to suggest that refusing to uphold a decision reached through legitimately democratic procedures threatens the freedom of the people to govern themselves.[33]

According to the Court's accepted model, therefore, the first amendment should protect the citizens from the government in its role as the electorate's agent but not from the government when it carries out the will of the majority of the electorate. Ironically, those commentators who emphasize the nonmajoritarian protections afforded by the first amendment defend the importance of the first amendment's core values on the basis that those values represent the majority's will.[34]

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33. Professor Lee Bollinger identified this deepest of difficulties for the democratic model when he wrote:

> But if the people themselves, acting after full and open discussion, decide *in accordance with democratic procedures* that some speech will no longer be tolerated, then it is not "the government" that is depriving "us," the citizens, of our freedom to choose but *we* as citizens deciding what the rules of conduct within the community will he. Then the "democracy" has functioned, and it may be asked whether it does not "[strike] at the very heart of [a] democracy" to say that the citizens cannot choose to make that decision.

L. BOLLINGER, *supra* note 32, at 50-51. The lineage of this idea can be traced back at least as far as John Stuart Mill. Mill stated:

> It was now perceived that such phrases as "self-government" and "the power of the people over themselves," do not express the true state of the case. The "people" who exercise the power are not always the same people with those over whom it is exercised; and the "self-government" spoken of is not the government of each by himself, but of each by all the rest . . . . and in political speculations "the tyranny of the majority" is now generally included among the evils against which society requires to be on its guard.

J.S. MILL, ON LIBERTY 62 (G. Himmelfarb ed. 1984) (1st ed. 1859).

34. *Compare* New York Times v. Sullivan, 376 U.S. 254 (1964) (Brennan, J.) *and* Brennan, *supra* note 18 (emphasizing the majoritarian model of Meiklejohn) *with* Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) (Brennan, J., dissenting) (arguing that the core of first amendment protections are nonmajoritarian).

This lapse in conceptual clarity may explain the Court's continuing difficulties in formulating a consistent approach to the intractable problem of the hostile audience; that is, whether majoritarian interests embodied in the hostile audience's response should override the speaker's right to speak. *Compare* Cantwell v. Connecticut, 310 U.S. 296 (1940) *and* Cohen v. California, 403 U.S. 15 (1971) (implying in dicta that audience response, no matter how hostile, cannot chill the speaker's right to speak) *with* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) *and* Feiner v. New York, 340 U.S. 315 (1951) (holding that the first amendment does not protect speech that incites a crowd to riot, a hostile audience problem). If the response on the part of the audience or the public can determine an individual's right to speak, then the protections of speech under the first amendment have all but vanished. The tort remedy of public disclosure is required precisely to prevent the chilling effects of the hostile audience problem. *See infra* notes 55-64 and accompanying text.

2. Lack of Protection for Extremist Speech

Recognition of the intolerant majority has led some modern scholars to rethink and refocus the speech protections afforded to the individual, possibly by aligning the government, from which the first amendment protects citizens under the classic democratic model, as a buffer between the individual and the hostile crowd.[35] An adequate model of the first amendment accordingly must protect each citizen from the unjustified interference of the majority as well as unjustified government interference; the model cannot rely on majoritarian values for its sole justification.[36] The central value promoted by the first amendment seems to lie closer to a societal ethic of tolerance[37] or an attitude of experiment,[38] even if the majority disapproves of the individual views expressed.[39]

Also troublesome is that the democratic model logically entails only the protection of speech and the transmission of information that is related to self-governance, namely, political speech.[40] While Meiklejohn did not restrict the protection of speech to mere political speech be-

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35. *See* Partlett, *supra* note 31, at 466-73; Welch, *supra* note 31, at 555-57.

36. *See* L. BOLLINGER, *supra* note 32, at 79-86, 182-83; Partlett, *supra* note 35.

37. L. BOLLINGER, *supra* note 32, at 197 (protecting what Professor Bollinger terms "extremist speech").

38. Professor Martin Redish has stated:

> [V]iewed from the broad perspective of history, any attempt by the government to lock in a prevailing scientific consensus is likely to be either futile or dangerous . . . . [S]uch attempts undermine both the search for knowledge and the development of a free and open exchange of information and opinion, traditionally deemed central values served by the right of free expression.

Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech*, 43 VAND. L. REV. 1435, 1443 (1990); *see also* Gertz v. Rohert Welch, Inc., 418 U.S. 323, 339 (1974) (stating that "there is no such thing as a false idea [under the first amendment]").

39. Compare this attitude of nonmajoritarian experiment with Judge Bork's analysis when he wrote:

> The Constitution creates a republican form of government in which political speech is essential to arrive at consensus on various issues. Majorities make up their minds and either do or do not enact laws. In such a government, speech advocating the forcible overthrow of the government and the seizure of power by a minority has no value because it contradicts the premises of constitutional democracy.

R. BORK, TEMPTING AMERICA, *supra* note 11, at 333-34. According to Professor Bollinger, however, speech, or more precisely "extremist speech," that lacks majoritarian and democratic value still is protected by the core first amendment value of toleration. Professor Bollinger noted that "it is not the absence of social value that determines whether the principle of free speech is applicable; indeed, the perceived absence of value is, if anything, a major reason for protection, or, more accurately, for toleration. . . ." L. BOLLINGER, *supra* note 32, at 182.

40. *See supra* notes 16-19 and accompanying text; *see also* Bork, *Neutral Principles*, *supra* note 11, at 20, 26-29, 31. In fairness to Judge Bork, he has abandoned the crabbed position that confines constitutional protections to only political speech. *See* R. BORK, TEMPTING AMERICA, *supra* note 11, at 333-36.

cause he saw cultural expression as beneficial to self-government,[41] the purists of his position have criticized the extension of first amendment protections to the penumbras of political speech.[42] If the deeper values promoted by the first amendment, however, are instrumental not only to majority self-governance but also to the establishment of an ethic of general tolerance irrespective of the majority's approval or disapproval,[43] then the first amendment must be read more broadly than the classical view suggests. Instead, its protections should encompass not only extremist political speech that advocates the forcible overthrow of the very system that protects it, but also many forms of individual self-expression that are not, strictly speaking, political speech.[44]

3. No Incorporation of Individual Autonomy

Under an instrumentalist's scheme in which all values serve other values, a final question that the classic democratic model must answer is why promote democracy at all? If freedoms of speech and press are instrumental to the functioning of the democratic process, what value does democracy serve in turn? It is circular to argue that democracy serves as a better system if by "better" one means more democratic or encouraging more democracy,[45] and empirically the proposition that democracy is a more efficient form of government is highly doubtful.[46]

The reason for promoting democracy, according to Professor Martin Redish, is that the democratic system is process oriented, not necessarily more efficient.[47] The process orientation of democracy increases the value of individual autonomy.[48] The ultimate value of democracy is, therefore, the self-realization of the individual.[49] If the classic model is

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41. Meiklejohn theorized that "the people do need novels and dramas and paintings and poems, 'because they will be called upon to vote.' " Meiklejohn, *supra* note 16, at 263 (citation omitted).

42. Bork, *Neutral Principles*, *supra* note 11, at 26-29, 31. *But cf.* R. BORK, TEMPTING AMERICA, *supra* note 11, at 333.

43. *See supra* notes 37-39 and accompanying text.

44. *See* L. BOLLINGER, *supra* note 32, at 151-58, 182. *But see* Bork, *Neutral Principles*, *supra* note 11, at 31.

45. Redish, *Value of Free Speech*, *supra* note 15, at 602 (asking "[h]ow are we to decide what is 'better'? Higher gross national product? More international influence? And better for whom? Elites? A Majority? Oppressed minorities?").

46. Redish stated, "[I]t is doubtful that we could establish empirically that throughout history democracies have fared better than other forms of government. After all, we do know that the trains ran on time in Mussolini's Italy; can the Chicago Transit Authority make the same claim?" *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 603-04. Professor Ruth Gavison commented:

> Privacy is also essential to democratic government because it fosters and encourages the moral autonomy of the citizen, a central requirement of a democracy. Part of the justification

forced to recognize personal autonomy as the ultimate goal of democracy and, therefore, necessarily a core value of the first amendment,[50] then the model's internal premises necessitate protecting and promoting the individual. The question that remains is whether the protections now afforded the individual under the classical democratic model include the privacy interests of the individual originally thought by Meiklejohn to be excluded from the core protections of the first amendment.

This analysis comes full circle back to Justice Brandeis's original claim that democratic society must protect free speech both as a means and as an end.[51] Freedoms of speech and press are indispensable means to democracy, but they also serve the final end of having individuals control their own destinies. Perhaps the ultimate weakness of the classical model is that it disregards the importance of the first amendment as an intrinsically valuable goal of democracy, in favor of preserving only the function of the first amendment as a means to democratic rule.

Refocusing first amendment analysis by adopting a broader vision of first amendment protections is not meant to deny the explanatory force of Meiklejohn's model of the first amendment. The effectiveness of the model, however, seems to depend on assumptions that when closely analyzed push the commitments of the model away from protecting the citizen as the majority and toward protecting the citizen as an individual. If the above analysis is accurate, then a model that traditionally has not afforded first amendment protections to the citizen as an individual must be modified. Part III develops an amended Meiklejohn model, one that incorporates individual privacy interests into the first amendment calculus.

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for majority rule and the right to vote is the assumption that individuals should participate in political decisions by forming judgments and expressing preferences. Thus, to the extent that privacy is important for autonomy, it is important for democracy as well.

Gavison, *supra* note 1, at 455. The model of first amendment protections developed in Part III will follow closely the analysis of the three concepts of democracy, privacy, and autonomy in the above passage.

50. Many different interpretations have been given to the argument for autonomy, which faces difficult problems, *see supra* note 15, such as rewriting the Court's analysis of economic rights long ago repudiated in Lochner v. New York, 198 U.S. 45 (1905), so that gauging how to incorporate self-realization into Meiklejohn's model remains difficult. Part III of this Note attempts this incorporation.

51. *See supra* note 11.

III. Private Facts and the Zone of Deliberation: Meiklejohn Amended

A. *After the Receipt of Information and the Zone of Deliberation*

Although the Court has never set out the elements of the Meiklejohn model, the model's operation would seem to require two separate stages. The first stage concerns the protection of the transmission of information from speaker to listener. The current Court's first amendment jurisprudence is concerned almost exclusively with protecting this first stage of activity. The protection of the citizen during the transmission of information to the listener is the protection of the citizen as part of the self-governing majority analyzed in Part II.[52]

The second stage in the process under Meiklejohn's model is the individual's application of the information received to the individual decisions of self-governance. The current Court's first amendment jurisprudence almost entirely ignores this deliberation stage of the model. Both stages of the process, however, are needed to achieve what, in the Court's view, the Constitution envisions: free individual choice by each citizen.

In the context of the first stage of communicating information from speaker to listener, the Court has recognized that inhibiting or chilling the participation of individuals in a system of free speech and press diminishes the self-governing rights of at least those individuals.[53] Therefore, it has applied the first amendment to forestall those potential inhibitory effects. At the same time, however, the Court has neglected the freedom from inhibition at the second stage—the listener's subsequent deliberation—which begins after the communication between speaker and listener is complete. The Court implicitly assumes that speech need only reach the listener's ear for the freedoms of speech and press under the democratic model to operate successfully.[54]

A possible reason for the Court's disregard of the model's second stage is that the threat of inhibition at the second stage is much harder to imagine than the threat of inhibition at the first stage. If public disapproval of unpopular beliefs causes inhibition, then speakers in the first stage are obviously vulnerable. By making their beliefs public,

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52. *See supra* notes 23-24 and accompanying text.

53. *See, e.g.*, Baird v. State Bar, 401 U.S. 1, 6 (1971); Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967); Lamont v. Postmaster General, 381 U.S. 301, 307 (1965). *But see* Laird v. Tatum, 408 U.S. 1, 11 (1972).

54. The Court often has used the phrase "right to receive information and ideas," *e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 762 (1972); Stanley v. Georgia, 394 U.S. 557, 564 (1969), but it has invoked the right only to protect the act of communication between speaker and listener. The phrase never has been used to indicate any hearer's right to first amendment protection in his subsequent decision making.

these speakers invite antipathy and perhaps suppression.

The second stage of the model, in contrast, occurs entirely within the mind of the individual, who attracts no attention by deliberating. The private nature of the activity insulates the individual from the potential of a hostile public response. Perhaps a hostile public would inhibit unpopular decisions that the individual reaches if the deliberation process were known, but how can the public discover the substance of an individual's deliberations unless the information used and the experiences considered are made public? The insulation of an individual from the chilling effect of public disapprobation of deliberations and experiences is accomplished by preventing this public knowledge about the particular individual.

Privacy is precisely the name that the public disclosure tort cases give to the individual right to control information about oneself.[55] Professor Ruth Gavison, while defining perfect privacy in terms of secrecy, anonymity, and solitude,[56] concludes that the common analysis of all privacy liberties is that privacy enables individuals to think and act freely without public hostility or humiliation.[57] This proposition mirrors the hostile audience problem identified in the first stage and equally inhibits the democratic decision-making process.[58]

Privacy understood in this special sense—as control of personal information to avoid the hostile audience problem—can be identified as the individual's zone of deliberation. This zone of deliberation is a necessary prerequisite to the operation of the second stage of the Court's democratic model—application of public information to decisions of self-governance—at least if that second stage is to operate free from inhibition as the Court firmly has guaranteed at the first stage of the same model.

Justice William O. Douglas, in his dissent in *United States v. Caldwell*,[59] seems to have anticipated the two stages of the democratic model proffered in this Note. Justice Douglas acknowledged Meiklejohn's first amendment model and then identified two principles that he derived from the model: First, the need to guarantee individual

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55. *See, e.g.*, Doe v. McMillan, 412 U.S. 306 (1973) (involving schoolchildren's disruptive behavior); Sidis v. F-R Publisbing Corp., 113 F.2d 806 (2d Cir. 1940) (concerning a genius's decline); Melvin v. Reid, 112 Cal. App. 285, 289-90, 297 P. 91, 92-93 (1931) (involving a plaintiff's former career as a prostitute); *see also* Prosser, *supra* note 6, at 392-98. For a critique of the public disclosure tort, see Kalven, *supra* note 1, at 333-39.

56. Professor Gavison described perfect privacy as a situation in which "no one has any information about X [secrecy], no one pays any attention to X [anonymity], and no one has physical access to X [solitude]." Gavison, *supra* note 1, at 428.

57. *Id.* at 451.

58. *See supra* note 34 and accompanying text.

59. This case is one of three cases consolidated in Branzburg v. Hayes, 408 U.S. 665 (1972).

liberty to hold and experiment with individual beliefs and opinions through a blanket protection of privacy, and second, the disabling effect that inhibition of the free flow of information has on the ability of individuals to perform self-governance.[60] Justice Douglas's first principle is analogous to the second stage of Meiklejohn's model as proposed here, and his second principle is analogous to the first stage.

One simple observance of privacy's importance to self-governance is the curtain on the voting booth, but the shelter of privacy is needed for more than the casting of the formal vote. Individuals register self-governing choices through methods other than vote casting. Moreover, the process of reaching a decision does not take place only at the moment of formal choice registering; it is a continuous process that begins with the receipt of each item of information from a speaker and concludes with each choice, formal or informal, that the citizen registers.[61] An individual who listens and decides in a glass house is coerced by public opinion, regardless of whether anyone actually looks in the windows. If every magazine read, every rally attended, or every conversation engaged in might somehow become a matter of public knowledge, the individual would feel inhibited.[62] The pressure is analogous to that felt by members of the National Association for the Advancement of Colored People (NAACP) in Alabama when they feared that their membership would be publicized.[63]

Even though the Court sometimes has recognized that the public disclosure of private facts chills an individual's ability to make self-gov-

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60. *Id.* at 714-15. After quoting from Meiklejohn, Justice Douglas wrote:

> Two principles which follow from this understanding of the First Amendment are at stake here. One is that the people, the ultimate governors, must have absolute freedom of, and therefore privacy of, their individual opinions and heliefs regardless of how suspect or strange they may appear to others. Ancillary to that principle is the conclusion that an individual must also have absolute privacy over whatever information he may generate in the course of testing his opinions and beliefs. . . . The second principle is that effective self-government cannot succeed unless the people are immersed in a steady, robust, unimpeded, and uncensored flow of opinion and reporting which are continuously subjected to critique, rebuttal, and re-examination.

Id.

61. For a sample of the most cogent arguments that privacy reflects a psychological need of individuals to keep some core of personality to themselves, outside the notice of society, see H. ARENDT, THE HUMAN CONDITION 22-78 (1958); E. GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959); A. WESTIN, *supra* note 1, at 8-63; Gavison, *supra* note 1, at 444-55; Bloustein, *supra* note 1, at 1002-03; Rubenfeld, *supra* note 1, at 743; Warren & Brandeis, *supra* note 1, at 205; *cf.* Meiklejohn, *supra* note 16, at 255-57.

62. Bloustein, *supra* note 1, at 1003; *see also* Nader v. General Motors Corp., 25 N.Y.2d 560, 573, 255 N.E.2d 765, 773, 307 N.Y.S.2d 647, 658 (1970) (Breitel, J., concurring).

63. NAACP v. Alabama, 357 U.S. 449, 462 (1958) (stating that "[t]his Court has recognized the vital relationship between freedom to associate and privacy in one's associations" and that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs").

erning decisions,[64] inhibition of self-governance can be accomplished just as effectively by eroding the protections of the individual's zone of deliberation, as by inhibiting the flow of information to the listener through public debate.[65] If the democratic model is to be maintained, an interest in protecting the privacy of the individual clearly exists under the first amendment. The democratic model cannot allow its society to open the curtain to expose the individual and still to expect the participatory scheme to survive.

B. The Symmetry of Protections: The Accommodation of Private Facts and Public Interests

If privacy consists primarily of the individual's controlling, or keeping secret, personal information, then the first amendment interest in privacy will extend only to certain types of information: that information which, if released, would inhibit the individual's freedom to reach decisions concerning self-government. This confining of privacy interests to include only private facts necessary to decisions related to self-governance seems vulnerable to a critical analysis similar to that in Part II, which demonstrated the lapse in conceptual clarity by those commentators who would limit the protections of speech to only political speech.[66] This restricted view of privacy interests would seem to exclude the most private of private facts from protection because intimate facts often are unrelated to the individual's ability to reach uninhibited decisions of self-governance.[67]

The analysis in this Note presumes that both the public's interests in press and speech freedoms and the individual decisionmaker's interests in privacy are related directly to the promotion of the same first amendment values of self-government and tolerance. Consequently, if the individual's privacy protection diminishes when the particular intimate facts are not related directly to individual self-governance, then, to preserve the model's symmetry, protection of the public's interest in knowing these facts should diminish correspondingly because the facts equally are unrelated to informed majority rule. The legitimate public interests of the citizens as a majority under this model are restricted to the function of informing the public on issues of self-governance to the same extent that privacy interests are restricted by those issues. Public curiosity does not create a legitimate public interest unless the informa-

64. *Id.*; *see also* Louisiana v. NAACP, 366 U.S. 293 (1961).

65. *See supra* notes 55-64 and accompanying text.

66. *See supra* notes 40-44 and accompanying text.

67. For example, the fact of being a rape victim is unrelated to decisions concerning self-governance. Florida Star v. B.J.F., 109 S. Ct. 2603, 2609 (1989).

tion transmitted relates to the function of citizens in their sovereign capacity.[68] A reduced privacy interest entails a greater public interest only if the different interests promote different concerns. This assumption no longer can be maintained given the analysis herein.[69]

In addition, the disclosure of private information and facts by itself does not inhibit an individual's privacy or deliberation unless linked to the identification of that individual. Most suits for injury caused by public disclosure of private facts have focused on the single issue of identification.[70] Thus, society can accommodate the competing first amendment claims of the publisher and the individual in public disclosure cases if private information relevant to the self-governing choices of the public is transmitted, but the identity of the subject of that information is not.[71] With the heightened protection afforded to the privacy interests of the individual as decisionmaker under this amended model, publishers will have to be careful that the information they are about to publish really relates to issues of self-governance and does not identify a private individual in a manner which inhibits that individual's decision making. But does this newly required scrutiny on the behalf of publishers lead to self-censorship and to the eventual chilling of the publication of legitimate public interests and issues?[72]

Certainly the first line of inquiry, identifying legitimate public issues, is one that the Court has avoided repeatedly by deferring to the press.[73] This deference can be attributed to the erroneous assumption that if the information is in the news, then the information is newsworthy.[74] The Court's assumption, however, is intellectually inconsistent with the deeper understanding of the Court's own model.[75] By

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68. Bloustein, *supra* note 5. Professor Bloustein has contended:

> "Public interest," taken to mean curiosity, must be distinguished from "public interest," taken to mean value to the public of receiving information of governing importance. There is, to be sure, a constitutionally protected right to satisfy public curiosity and publish lurid gossip about private lives. But this, in Meiklejohn's terms, is a limited or qualified fifth amendment right, to be distinguished from the absolute or unqualified first amendment right of the public to learn about those aspects of private lives which are relevant to the necessities of self-government.

Id. at 56-57.

69. *See supra* note 68 and accompanying text.

70. *See supra* note 55.

71. For a similar method of accommodation of first amendment protections, see Bloustein, *supra* note 5, at 56-61.

72. The Court and commentators often raise this difficult problem of self-censorship. *See, e.g., Florida Star*, 109 S. Ct. at 2610; F. SCHAUER, *supra* note 15, at 168-73; *see also infra* notes 111-15 and accompanying text (analyzing self-censorship in *Florida Star*).

73. *Florida Star*, 109 S. Ct. at 2611; *see* Bloustein, *supra* note 5, at 77-94.

74. *See infra* notes 106-08 and accompanying text; *see also* Bloustein, *supra* note 5, at 57. *But see* Kalven, *supra* note 1, at 336.

75. *See infra* notes 106-07 and accompanying text.

deferring to the press, the Court undermines the deliberation stage of a workable Meiklejohn model of the first amendment.

While distinguishing legitimate public interests from purely private information is necessary for the purpose of intellectual consistency, a proper assessment is extremely difficult to perform.[76] Possibly a second line of inquiry would avoid the inconsistency and lessen the difficulty of this assessment. A plausible and fairly simple rule would be a presumption against freedom of speech and press for publishers who link the transmission of the information to the identification of a private individual. The identification of the individual is rarely relevant to the purposes of self-governance. The presumption effectively would bar identification if it is reasonably likely to inhibit the individual decisionmaker by exposing private facts.

Of course, cases exist in which the identity of a person involved in an event is itself relevant to the purposes of self-governance, as when the person holds a public office or a place in the public eye.[77] While this scenario seems to unbalance the neat symmetry of first amendment protections afforded to press and privacy under the presented model, in many cases the identification of the subject of a published news item is not of significant value. The identity of the subject, in contrast to the substance of the information, is unlikely to influence the reader's political choices. When the identity of the subject is legitimately in the public interest the symmetry of first amendment protections is not broken because the individual in these cases is identified with the government, an agent of the majority, and thus, the first amendment protections of press and privacy no longer are counterpoised. Under the amended model of Meiklejohn, the government is subject to majoritarian restraints when the private individual, both as a member of the self-sovereign majority and as an individual self-governing decisionmaker, is not subject to those restraints.[78]

If the plaintiff in a public disclosure case is not well known, publication of the fact or event satisfies the public's first amendment interest; the first amendment interest of plaintiffs is satisfied if the

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76. For the most comprehensive attempt at calculating what properly constitutes the concept of public interest, see Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 603 (1990).

77. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (expanding tbe category of public issues to include information about public figures); New York Times v. Sullivan, 376 U.S. 254 (1964) (including in the category of public issues information about public officials). *But see* Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157 (1979); Hutchinson v. Proxmire, 443 U.S. 111 (1979); Time, Inc. v. Firestone, 424 U.S. 448 (1976) (narrowing the category of public figure). *See generally* Kalven, *The Reasonable Man and the First Amendment:* Hill, Butts, *and* Walker, 1967 SUP. CT. REV. 267.

78. *See supra* subpart II(A).

publisher refrains from identifying them. Thus, the public, including publishers, has no valid constitutional objection to preserving a tort remedy for plaintiffs if the given publisher does identify, and thereby injure, the plaintiff. The Court, however, can reach this result only if it addresses the constitutional privilege to tell the public a piece of news separately from the symmetrical and competing constitutional privilege to refrain from publicly identifying the person involved.[79]

Evaluating the constitutionality of a given public discourse suit should include a calculation of which result will best serve the total system of first amendment protections, a system of which both the press and the individual are a part and to which both appeal. The Court's end calculation may favor publication, but the Court should engage in the actual process of calculation and not accept blindly a blanket assertion that the privileged publication of "newsworthy" items of information always serves the first amendment best. At least with regard to identification, as suggested above, the calculation of effect on a system of free expression might produce the opposite result. If so, the Court cannot invalidate automatically under the first amendment a public disclosure tort action addressed to the unauthorized publication of identities.

IV. Climbing Back Up the Slippery Slope: *Florida Star v. B.J.F.*[80]

The paradigm scenario for interference with the core privacy interests in the first amendment would be the public disclosure of private facts that inhibit or chill the individual's decision making on matters of self-government and that link the identity of the private individual to those private facts.[81] As yet the Supreme Court has not faced this paradigm case.[82] *Florida Star v. B.J.F.*,[83] the latest case in a meager line of Supreme Court cases dealing with privacy and first amendment issues,[84] most resembles the paradigm scenario.

A. *The Factual Background of* Florida Star v. B.J.F.

Florida Star concerned a newspaper in Florida that published the name of a rape victim in violation of state law[85] as well as the publica-

79. *See supra* notes 54-63 and accompanying text.
80. 109 S. Ct. 2603 (1989).
81. *See supra* notes 70-79 and accompanying text.
82. *See supra* note 29.
83. 109 S. Ct. 2603 (1989).
84. *See supra* note 29 (citing sparse case law in this area).
85. 79 Fla. Stat. § 794.03 (1987). The statute in its entirety provides:
Unlawful to publish or broadcast information identifying sexual offense victim—No person shall print, publish, or broadcast, or cause or allow to be printed, published, or broadcast, in

tion's own internal policy.[86] B.J.F. was raped at knifepoint in 1983. She reported the crime to the sheriff's office, and she filed a report. Under Florida law, the report was confidential and not available for public inspection.[87] Nevertheless, the sheriff's department inadvertently allowed a reporter from the newspaper access to the report. The reporter then copied the information verbatim.[88]

State law charged the newspaper with the statutory confidentiality of the report and prohibited transcribing its confidential portions.[89] Furthermore, the reporter who obtained the information testified that signs in the press room stated that publishing the name of a rape victim is unlawful.[90] The reporter also knew when she copied the full name of B.J.F. that the newspaper had a policy against identifying victims of sexual offenses. At trial the reporter acknowledged that she was not supposed to copy the name of a rape victim from a police report.[91] Nonetheless, she copied the information.

The newspaper subsequently published an account of the rape that identified B.J.F.'s full name, address, and telephone number.[92] At the time of publication, no adversarial proceeding had begun, and the police had not identified or apprehended a suspect.[93] Shortly after the newspaper had printed the story, while B.J.F. was in the hospital, a man called her mother and threatened to rape B.J.F. again.[94] Because of the publicity and the telephone calls, B.J.F. required police protection, changed her address and telephone number, and sought mental health counseling for her emotional distress. B.J.F. sued both the sheriff's department[95] and *The Florida Star*.

The trial court found that *The Florida Star* recklessly disregarded B.J.F.'s privacy rights[96] and awarded her compensatory and punitive damages against the newspaper totaling one hundred thousand dol-

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any instrument of mass communication the name, address, or other identifying fact or information of the victim of any sexual offense within this chapter. An offense under this section shall constitute a misdemeanor of the second degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

Id.

86. *Florida Star*, 109 S. Ct. at 2606.
87. *Id.* at 2606.
88. *Id.* at 2605-06.
89. *Id.* at 2606.
90. *Id.* at 2616 (White, J., dissenting).
91. *Id.*
92. *Id.* at 2606.
93. *Id.* at 2608.
94. *Id.* at 2606.
95. *Id.*
96. *Id.* at 2616 (White, J., dissenting).

lars.[97] On appeal, the Supreme Court reversed on the grounds that the imposition of civil damages on the newspaper, pursuant to the Florida statute, violated the first amendment.[98]

The plaintiff in *Florida Star* was not a public official or a public figure. The private facts that were published were not in the public domain prior to the negligent handling of the crime report by the sheriff's office and the reckless copying of that report by the reporter from *The Florida Star*. The report clearly revealed the plaintiff's identity, but the facts identifying B.J.F., though clearly of the highest intimate nature to her, were arguably not facts that, if disclosed, necessarily would inhibit B.J.F.'s decision making on matters of self-government. Given the amended model of first amendment protections developed in Parts II and III, publishing the information of the crime, but withholding the name of the victim, would have accommodated the interests of press freedom and privacy.[99] If the Supreme Court consistently had applied the model that it adopted in *New York Times v. Sullivan*,[100] the Court would have upheld the judgment against *The Florida Star*. What were the reasons for the Court's reversal; what went wrong?

B. *Analysis of the Court's Holding in* Florida Star v. B.J.F.

The Supreme Court found the rule of *Smith v. Daily Mail Publishing Co.*[101] to be controlling in *Florida Star*.[102] In *Daily Mail* the Court held that a state cannot penalize the publisher of true, publicly significant information, unless the state has a compelling interest in keeping the information private.[103] The Court elaborated on its acceptance of *Daily Mail*'s strong presumption in favor of press protection by identifying several considerations. First and foremost, the Constitution protects an overarching public interest in disseminating truth.[104] This concern, of course, restates the importance of protecting the first stage of the Meiklejohn model.[105] The protections entailed by the second stage of the Meiklejohn model, the zone of deliberation, should counter-

97. *Id.* at 2606.

98. *Id.* at 2605.

99. *See supra* notes 70-71 and accompanying text.

100. *See supra* notes 17-19 and accompanying text.

101. 443 U.S. 97 (1979).

102. 109 S. Ct. at 2609.

103. The ruling in *Daily Mail* states, "[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Id.* (quoting *Daily Mail*, 443 U.S. at 103 (alteration in original)).

104. *Id.*

105. *See supra* notes 20-25 and accompanying text.

balance the Court's reasoning.[106] Thus, B.J.F. should have a cognizable claim that the privacy of that information is also important to her decision making; exposure of the information inhibits her ability to deliberate freely.

The privilege with respect to the transmission of information in the model's first stage only pertains to legitimate public issues. The Court found that the article in *The Florida Star* generally was of significance to the public.[107] To support this rather vague assessment, Justice Thurgood Marshall stated that once factual matter is available to the public, the Constitution prohibits the restraint of its publication.[108] On its face, this argument is clearly erroneous. The argument contends that if some item of information makes its way into the public domain, then the item is legitimately a public issue. The argument is inconsistent with the fundamental justification for press protections in the Court's first amendment model—the instrumental function of the press in transmitting information to the sovereign citizenry for informed majority rule.

The information that identifies B.J.F. as a rape victim does not pertain to self-governance. Even if the information was only generally of public significance—meaning only that information pertaining to the crime of rape in general informs the citizenry of certain politically significant social arrangements—could not a publisher disseminate the significant information by reporting the facts of the crime without identifying the name and address of the victim? That the right to appreciate the general significance of the information could have been protected without reporting the specifics of B.J.F.'s name and address seems obvious.

The Court noted that the *Daily Mail* holding only protects the publication of lawfully obtained information.[109] Justice Marshall stated that even if the sheriff's office failed to keep B.J.F.'s identify confidential as required by the Florida statute, the law cannot punish the good faith[110] recipient of the information.[111] Under Florida law, however, po-

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106. *See supra* Part III.

107. *Florida Star*, 109 S. Ct. at 2611.

108. Justice Marshall, quoting *Daily Mail*, 443 U.S. at 103, wrote, "once the truthful information was 'publicly revealed' or 'in the public domain' the court could not constitutionally restrain its dissemination." *Florida Star*, 109 S. Ct. at 2610 (citation omitted).

109. *Florida Star*, 109 S. Ct. at 2609.

110. *Id.* at 2610-11.

111. *Id.*; *see also* Ashdown, *Good Faith, the Exclusionary Remedy, and Rule-Oriented Adjudication in the Criminal Process*, 24 WM. & MARY L. REV. 335 (1983); Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365 (1981); *cf.* United States v. Leon, 468 U.S. 897 (1984) (adopting a good faith exception to the exclusionary rule).

lice reports that reveal the identity of a rape victim are not among the matters that the public, by law, is entitled to inspect. That the reporter who copied the information was fully aware that Florida law prohibited her from transcribing it or taking it from the sheriff's office is also significant.

Justice Marshall's final reason[112] for applying *Daily Mail* to *Florida Star v. B.J.F.* was the concern that penalizing the publication of factual information would make the press reluctant to report sensitive factual information even if that information is clearly of interest to the public.[113] Given the fallibility of the courts, a rule penalizing factual falsity often may penalize truth.[114] The mere risks of the cost and inconvenience of litigation, as well as the uncertain damages that might incur, will lead publishers not to publish information, even if that information is true.[115]

Clearly, the public has no legitimate interest in receiving intimate information concerning the personal affairs of purely private citizens; this knowledge cannot illuminate the citizenry about matters of self-government. Contrary to the Court's assumption, self-censorship by the press can be avoided by developing a framework to distinguish private from public information.[116] A presumption against the publisher's press freedom should arise when a news item identifies a purely private indi-

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112. After summarily dismissing the state's interests of encouraging victims of rape to report the crime, providing for the physical safety of the victims, and protecting the victim's right to privacy, Justice Marshall listed three independent reasons for applying the rule in *Daily Mail* to this case. First, the newspaper justifiably relied on the sheriff's department, and thereby, the information was obtained lawfully. *Florida Star*, 109 S. Ct. at 2611-12. In this case, however, the reporter knew that she was acting against Florida law and, as argued above, information making its way into the public domain is not transformed consequently into a public issue. Second, Justice Marshall was concerned that the per se negligence rule of the Florida statute did not meet even the reasonable person standard in *Restatement (Second) of Torts* § 652D. *Id.* at 2612. The legislature by prohibiting the public disclosure of such information, however, clearly established a strong general presumption of reasonable care. Third, Justice Marshall found the Florida statute underinclusive because it applies only to the mass media and not to local gossip. *Id.* at 2612. On the other hand, as Justice White responded, the statute fit within the larger body of tort law in Florida, which does include the traditional public disclosure tort covering local backyard gossip. *Id.* at 2617 (White, J., dissenting) (stating that "the Court's 'underinclusiveness' analysis itself is 'underinclusive' ").

113. *Id.* at 2610. Professor Schauer recognized the importance of this argument in his discussion of defamation. F. SCHAUER, *supra* note 15, at 170-71.

114. F. SCHAUER, *supra* note 15, at 170.

115. *Id.* at 170-71.

116. Professor Schauer has stated that "[k]nowledge as to the affairs and past of purely private persons serves little if any public purpose." *Id.* at 176. With respect to tort law for the invasion of privacy, Schauer continued, the dangers of self-censorship of public issues, the only kind of censorship forbidden under the Court's model, are not present because "purely private speech involves no such problems, and developing legal principles and rules to separate the public from the private is central to both enforcing the Free Speech Principle and keeping it within its proper scope." *Id.* at 177.

vidual and links that individual to private facts that, when exposed, would inhibit that individual's self-governing decision making. Publishing the facts or events in question satisfies the publisher's press freedom; withholding the name and personal identifying facts satisfies the privacy interest of the individual.

The ruling in *Daily Mail* not only is inapplicable to the facts of *Florida Star*, but also strikes the wrong balance between the competing interests of the public's right to know and the individual's right to be let alone. The rule essentially ignores the second stage of the model of the first amendment on which it is based.[117]

V. CONCLUSION

Although the analysis of privacy in the first amendment presented in this Note suggests a more symmetrical, balanced constitutional doctrine, the end result is limited. This privacy interest arises within the constitutional structure of a free expression system. In every case of public disclosure, the publisher will assert free expression claims that serve the same system. Because individual privacy is secured only at the expense of the free speech right of the publisher, it cannot expand beyond certain limits. Even under the amended model the first amendment privacy interest exists only to prevent the identification of an individual with published information and then, only after weighing the net effect on the free expression system.

An individual cannot assert a constitutional privacy claim directly against a private publisher who threatens to infringe the individual's privacy through publication.[118] Instead, the individual must rely on the indirect protection of a common-law tort suit,[119] after the offending

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117. *See supra* Part III. Justice White in his dissent in *Florida Star*, quoting Judge Merrill, wrote:

> Does the spirit of the Bill of Rights require that individuals be free to pry into the unnewsworthy private affairs of their fellowmen? In our view it does not. In our view, fairly defined areas of privacy must have the protection of law if the quality of life is to continue to be reasonably acceptable. The public's right to know is, then, subject to reasonable limitations so far as concerns the private facts of its individual members.

Florida Star, 109 S. Ct. at 2618 (White, J., dissenting) (quoting Virgil v. Time, Inc., 527 F.2d 1112, 1128 (1975), *cert. denied*, 425 U.S. 998 (1976)).

118. Of course, if a state agency publishes the information, that publication presumably is state action. *See, e.g.*, Burton v. Wilmington Parking Autb., 365 U.S. 715, 721-26 (1961). In that event, individuals could assert their first amendment rights against the state directly by claiming state inhibition of freedom of decision making.

119. If the legislature codified the public disclosure tort in a state statute, one might argue that a refusal by the state courts to enforce the resulting state right of privacy itself may be sufficient state action to create federal jurisdiction. If the lack of a tort constitutes a conspicuous lack of state regulation, the deficiency itself might serve as evidence of state action. *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369 (1967).

publication. Moreover, not all states recognize a public disclosure tort in their common law;[120] in those that do not, the individual would have no mechanism through which to assert a claim for protection.[121]

On the other hand, this analysis of privacy in the first amendment directs attention to the one form of privacy that the law, both statutory and constitutional, so far has been unable to protect successfully: the noncorporeal right to control information about oneself. Furthermore, the analysis suggests how privacy in that form might be integrated into a system of constitutional rights. The focus on the importance for privacy of information in the deliberation process, regardless of its content, is perhaps the distinguishing contribution of this first amendment approach to privacy analysis.

A first amendment analysis of privacy teaches that applying free speech guarantees exclusively to speakers will not protect the system of free expression adequately; decisionmakers must be sheltered, too. For the protection of privacy, the analysis herein yields a constitutional interest that cannot always be vindicated because it must compete with conflicting constitutional interests arising from the same logic. Yet the nature of privacy itself causes its entanglement with other social and legal interests and values. The first amendment analysis of privacy makes these entanglements and compromises explicit while at the same

120. A majority of courts that have considered the issue have recognized a public disclosure tort. *See, e.g.*, Dunlap v. McCarty, 284 Ark. 5, 678 S.W.2d 361 (1984); Forsher v. Bugliosi, 26 Cal. 3d 792, 608 P.2d 716, 163 Cal. Rptr. 628 (1980); People v. Home Ins. Co., 197 Colo. 260, 591 P.2d 1036 (1979); Wolf v. Regardie, 553 A.2d 1213 (D.C. 1989); Cape Publications v. Hitchner, 549 So. 2d 1374 (Fla. 1989); Baker v. Burlington Norther, 99 Idaho 688, 587 P.2d 829 (1978); Bush v. Maine Sav. Bank, 387 A.2d 1127 (Me. 1978); Tower v. Hirschhorn, 397 Mass. 581, 492 N.E.2d 728 (1986); Young v. Jackson, 572 So. 2d 378 (Miss. 1990); Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942); M & R Investment Co. v. Mandarino, 103 Nev. 711, 748 P.2d 488 (1986); Eddy v. Brown, 715 P.2d 74 (Okla. 1986); Tollefson v. Price, 247 Or. 398, 430 P.2d 990 (1967); Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976); Cowles Publishing Co. v. Washington, 109 Wash. 2d 712, 748 P.2d 597 (1988); Zinda v. Louisiana Pacific Corp., 149 Wis. 2d 913, 440 N.W.2d 548 (1988). Some courts have not recognized a public disclosure tort because of a presumed conflict with the first amendment. *See, e.g.*, Hall v. Post, 323 N.C. 259, 372 S.E.2d 711 (1988). *See generally* W. PROSSER, LAW OF TORTS 804 (4th ed. 1971).

121. *But see supra* note 118. The notion of individuals' dependence on state laws to protect their federal constitutional rights is less startling than it seems; even the right to free speech depends to an extent on state laws prohibiting, for example, assault and battery. If state law did not protect a speaker from an angered listener's physical violence, or if a newspaper could not use state law to prevent its equipment from being destroyed by a displeased audience, freedom of speech and of the press effectively would be curtailed. *See also* McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987) (arguing that the original structure of the Constitution protected the most essential individual rights *only* under state law); Stewart, *Federalism and Rights*, 19 GA. L. REV. 917 (1985) (same).

time clarifying the claims to be balanced and the process to be used in balancing these competing claims.

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